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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON DC 20268-0001

TRANSFERRING FIRST-CLASS MAIL PARCELS TO THE COMPETITIVE PRODUCT LIST	))	Docket No. MC2015-7

SUPPLEMENTAL COMMENTS OF GAMEFLY, INC.
(January 28, 2015)

GameFly, Inc., respectfully submits these supplemental comments. Their purpose is to (1) alert the Commission to several major developments since the December 17, 2014 filing deadline for mailer comments; (2) respond to the alternative market dominance standards proposed by the Postal Service for the first time in this docket in its January 7, 2015 reply comments; and (3) respond to the Notice filed by the Postal Service on January 27, 2015 concerning the withdrawal of the Department of Justice competition report that was the centerpiece of the Postal Service's January 7 comments.[1]

I. THE POSTAL SERVICE'S RECENT NOTICES OF PRICE INCREASES IN R2015-4 AND CP2015-33 ARE ADMISSIONS THAT THE POSTAL SERVICE HAS MARKET DOMINANCE OVER FIRST-CLASS MAIL PARCELS.

The three most important developments affecting this case since December 17 are the Postal Service's filing of its CRA report for Fiscal Year 2014 (on December 29, 2014); Notice of Price Changes for market-dominant products in Docket No. R2015-4 (on January 15, 2015); and Notice of Changes in rates of General Applicability for Competitive Products in Docket No. CP2015-33 (on January 26, 2015).

[1] GameFly has separately moved today for leave to file these supplemental comments.

In its December 29 CRA report, the Postal Service admitted that its prices for First-Class Mail Parcels covered 108.86 percent of attributable cost in Fiscal Year 2014—*i.e*., were compensatory.[2]

In its January 15 notice of price changes in Docket No. R2015-4, the Postal Service admitted that it plans to impose increases averaging 10.18 percent in its already-compensatory prices of First-Class Mail Parcels—*five times* the average increase of 1.966 percent proposed for market dominant mail as a whole, and five times the increase in the CPI since the last CPI-based price adjustment—even if the current product transfer request is denied.[3]

Finally, in the January 26 notice of price changes in Docket No. CP2015-33, the Postal Service admitted that it will seek even steeper price increases on First-Class Mail parcels if the Commission allows the product to be reclassified as competitive: "Prices for First-Class Mail Retail parcels will be increased 22 percent if the transfer is approved."[4] Moreover, the biggest percentage increases will be in the lightest weight categories, where competition from private carriers is the weakest: [5]

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[2] USPS Cost and Revenue Analysis Report for FY 2014 (public version), "Cost 1" worksheet, cell R18 (filed December 29, 2014 in Docket No. ACR2014).

[3] Docket No. R2015-4, *Notice of Market-Dominant Price Adjustment*, USPS Notice (Jan. 15, 2015) at 20.

[4] Docket No. CP2015-33, USPS Notice of Changes in Rates of General Applicability for Competitive Products Established in Governors' Decision No. 14-5 (January 26, 2015), Governors' Decision No. 14-05 at 2-3.

[5] *Id*.

Price Increases on Single-Piece First-Class Parcels Proposed By USPS In CP2015-33			
Maximum Weight (Ounces)	**Existing Price ($)**	**Price Proposed in CP2015-33 ($)**	**Increase**
1	2.32	2.94	26.7%
2	2.32	2.94	26.7%
3	2.32	2.94	26.7%
4	2.50	3.12	24.8%
5	2.68	3.30	23.1%
6	2.86	3.48	21.7%
7	3.04	3.66	20.4%
8	3.22	3.84	19.3%
9	3.40	4.02	18.2%
10	3.58	4.20	17.3%
11	3.76	4.38	16.5%
12	3.94	4.56	15.7%
13	4.12	4.74	15.0%

Nothing in the Postal Service's filings in either R2015-4 or CP2015-33 suggests that the Postal Service intends that these price increases will be temporary, or believes that the increased rates will produce less total revenue or contribution than the existing rates would produce. To the contrary, the Postal Service has admitted that it does not expect the price increases to cause much falloff in volume or market share because even the increased prices "*would remain well below prices for alternatives*." USPS response to ChIR 1, Question 3(c) (emphasis added).

The Postal Service's admission that it is likely to profit from non-transitory price increases of this magnitude on First-Class Mail Parcels requires rejection of the proposed product transfer as a matter of law. As GameFly explained in its December 17 comments, the Commission's test for determining whether the Postal Service has sufficient market power over a product to preclude exempting it from maximum rate regulation under 39

U.S.C. § 3642(b) is the same standard adopted by the Department of Justice and the Federal Trade Commission in their *Merger Guidelines*: whether the Postal Service, if unconstrained by maximum rate regulation, could increase profits through a small but significant non-transitory increase in price ("SSNIP"). GameFly Comments at 2-3 (discussing Order No. 1448 in Docket No. MC2012-14, *Valassis NSA* (Aug. 23, 2012) at 24-25 (quoting Department of Justice/Federal Trade Commission *Horizontal Merger Guidelines*)); *Mobil Pipeline Co. v. FERC*, 676 F.3d 1098, 1100-1101 (D.C. Cir. 2012); *CF Industries, Inc. v. Surface Transportation Board*, 255 F.3d 816, 821-24 (D.C. Cir. 2001) (citing judicial precedent and antitrust treatises).

The Commission reaffirmed this standard last month in Docket No. MC2013-57, the DVD product transfer case:

> Consistent with the case law, the Commission applies the standard methodology for market definition and competitive analysis as set forth in the DOJ/FTC Guidelines. They set forth a useful and now standard and widely accepted method for analyzing whether a proposed action—in this case, a classification of round-trip DVD mailers as competitive—would likely result in a significant increase in the product's price above current levels. This methodology utilizes the so-called "hypothetical monopolist test" to define relevant antitrust markets. Specifically, the test can be used to assess whether a profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product.

Order No. 2306 in Docket No. MC2013-57, *Competitive Product List—Adding Round-Trip Mailer* (Dec. 23, 2014) at 18 (citing Merger Guidelines § 4.1.1); *accord*, Order No. 2306 at 14-15 (reaffirming the Commission's reliance on the DOJ/FTC Merger Guidelines); *id*. at 49 ("the central issue [under 39 U.S.C. § 3642(b)(2)] is whether the decrease in quantity

demanded is sufficient to cause overall Postal Service revenues to decline, despite an increase in unit price thereby precluding the Postal Service's exercise of market power by rendering the price increase unprofitable to the Postal Service."); *id*. at 51 (the Postal Service's "demonstrated pricing power" over DVD mail is evidence of the Postal Service's market power). The Postal Service's admitted ability to increase its contribution by raising prices on First-Class Mail Parcels warrants the same conclusion in the present case.

II. THE POSTAL SERVICE CONTINUES TO MISSTATE THE CONTROLLING LEGAL TEST FOR MARKET DOMINANCE.

The Postal Service, unable to reconcile its proposed price increases on First-Class Mail Parcels with Commission's market dominance standards, pretends that the standards do not exist. Completely ignoring the Merger Guidelines, the Postal Service asserted in its January 7 reply comments that certain standards promulgated by the Department of Justice in 2008 for *monopolization* cases brought under Section 2 of the Sherman Act require that the Commission give little or no weight to "direct evidence" of a firm's "profits, margins, or demand elasticities." USPS Reply Comments at 5-10. This alternative legal standard is a Postal Service invention. The Department of Justice made clear when promulgating the 2008 guidelines that their role was limited to assessing market power in cases where the alleged anticompetitive conduct had already occurred, and that the standards were *not* intended to replace the Merger Guidelines as the standards for assessing market dominance in merger cases and other contexts in which the potential anticompetitive conduct was merely potential. Moreover, and in any event, the Department of Justice *withdrew* the 2008 monopolization guidelines in 2009 out of a belief that they provided inadequate protection against abuse of market power.

The Postal Service's January 7 comments also misstated the relevant legal standards for *structural* analysis of the Postal Service's competition. The Postal Service asserted that the Commission should consider "competition" from another postal product—and then conceded that this "competition" does not satisfy 39 U.S.C. § 3642(b)(1). The Postal Service contends that the Commission should consider the effectiveness of competition from private carriers only at the aggregate, nationwide level—despite conceding that private carriers provide significantly less competition for small businesses, individual consumers, and mailers in rural areas. Finally, on several key points, the Postal Service's response to GameFly's arguments was essentially "We slipped this justification by the Commission before, so precedent requires the Commission to uphold us again." None of these arguments have merit.

A. The 2008 DOJ Monopolization Guidelines Provide No Basis For Abandoning The SSNIP Test.

The Postal Service has dealt with the Merger Guidelines test for market dominance by studiously ignoring it. The Postal Service's November 14 Request, January 7 Reply Comments, and January 27 Notice studiously avoid any mention of the Merger Guidelines, and the Commission's decisions in *Valassis* and the DVD mailer case embracing the SSNIP test and the Merger Guidelines generally as the appropriate standards for assessing market dominance under Section 3642. Instead, the Postal Service invokes an alternative standard in which direct evidence of the power to raise prices is essentially irrelevant under Section 3642. This alternative standard is a fantasy.

The primary authority cited by the Postal Service in its January 7 reply comments for disregarding direct evidence of the Postal Service's ability to raise prices was a 2008

Department of Justice policy statement which assertedly "concluded that 'direct evidence of a firm's profits, margins or demand elasticities is not likely to provide an accurate or reliable'" measure of "monopoly power." USPS Reply comments at 5-6 (quoting Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (2008)).[6] The Postal Service's reliance on this document pronouncement is completely misplaced.

First, the Department of Justice explicitly stated when promulgating the 2008 guidelines that they were intended to apply only in *monopolization* cases—*i.e*., cases in which the Department or a private party was challenging as anticompetitive conduct that had already occurred. In this context, the Department explained, the SSNIP test would be impractical because one could only speculate about what rate levels would have prevailed absent the challenged conduct. The Department of Justice emphasized that, in merger cases or other contexts where the abuse of monopoly power has *not yet occurred*, the SSNIP test of the Merger Guidelines remained controlling. *Competition and Monopoly* at 26-27. Hence, even if the 2008 Department of Justice monopolization guidelines were still in force, *they would not displace the Merger Guidelines standards for market dominance in cases like the present one.*

Second, as the Postal Service admitted in its January 27 notice, the 2008 monopolization guidelines are a dead letter: the Department of Justice withdrew them in 2009. The Department's grounds for doing so, however, were far more fundamental than the Postal Service admits in its January 27 notice. The DOJ disavowed the guidelines,

[6] The Postal Service cited 2008 Department of Justice policy statement nine times in its January 7 reply comments. *Id*. at nn. 17, 18, 20, 21, 23, 27, 32, 34 and 35.

in their entirety, because it believed that they offered inadequate protection against abuse of market power. As the Antitrust Division explained:

> As of today [May 11, 2009], the Section 2 report will no longer be Department of Justice policy. Consumers, businesses, courts and antitrust practitioners should not rely on it as Department of Justice antitrust enforcement policy.
>
> The report . . . raised too many hurdles to government antitrust enforcement . . . Withdrawing the Section 2 report is a shift in philosophy and the clearest way to let everyone know the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers . . . The [Antitrust] Division will return to tried and true case law and Supreme Court precedent in enforcing the antitrust laws.
>
> [The head of the Antitrust Division] said that implicit in [the] overly cautious approach [of the 2008 policy statement] is the notion that most unilateral conduct is driven by efficiency and that monopoly markets are generally self-correcting. "The recent developments in the marketplace should make it clear that we can no longer rely upon the marketplace alone to ensure that competition and consumers will be protected," [Antitrust Division Christine A.] Varney added.

Department of Justice News Release, *Justice Department Withdraws Report on Antitrust Monopoly Law* (May 11, 2009) (downloaded January 15, 2015, from http://www.justice.gov/atr/public/press_releases/2009/245710.htm).

The Postal Service salvages nothing by falling back on the "case law, economic testimony, and other supporting materials" cited in the now-abandoned 2008 guidelines. January 27 USPS Notice at 1-2. Consistent with the focus of the guidelines on after-the-fact challenges to past acts of alleged monopolization, all of the authorities cited by the Postal Service also involved allegations of *actual* acts of unlawful monopolization under

Section 2 of the Sherman Act. *See* USPS Reply Comments at nn. 19, 22 and 26 (citing cases). None of the cases involved the *potential* ability of a firm to raise its current prices *in the future* if it were allowed to merge with a competitor or exempted from maximum rate regulation. *Id*. Hence, none of the cited cases displace the standards of the Merger Guidelines. Equally important, in *none* of the cited cases did the defendants make the crucial admission that the Postal Service has made here: that it can profitably maintain significant and durable price increases.

B. The Postal Service's Other Implicit Attacks on the SSNIP Test Are Also Unfounded.

The Postal Service belatedly offers several other back-door attacks on the SSNIP test in its January 7 reply comments (again, without mentioning the Merger Guidelines, *Valassis*, or the DVD product transfer case). These criticisms are also without merit.

The Postal Service argues that the ability to raise prices does not prove the existence of market power unless the price increases result in prices that exceed costs, and the above-cost prices are "durable" (*i.e*., sustainable or non-transitory). USPS Reply Comments at 5-8. While these principles are unexceptionable, the Postal Service's own admissions satisfy them. The Postal Service *admitted* in its November 14 Request that its existing prices for First-Class Parcels are expected to produce a cost coverage "above 100 percent for FY 2014." USPS Request, Attachment B at 2. The Postal Service *admitted* in response to Chairman's Information Request 1, Question 3, that the price increases are expected to produce little diversion of First-Class Parcel volume, and thus a substantial increase in total contribution. GameFly comments at 7-9 (quoting USPS statements). Likewise, none of the Postal Service's filings in this docket, R2015-4 and

CP2015-33 suggest that the Postal Service intends that its proposed price increases will be temporary.

The possibility that First-Class Mail Parcels may not have become compensatory until the rate increases implemented during Fiscal Year 2014 took effect is immaterial. *Cf*. USPS Reply Comments at 8. The issue here is not whether the Postal Service engaged in "durable" supra-competitive pricing of First-Class Parcels *in the past*, but whether the USPS *now* possesses sufficient market power to maintain "durable" price increases *in the future* if the product were now exempted from maximum rate regulation. Because the Postal Service has effectively admitted that it now has this power, the Commission's inquiry under Section 3642 is at an end.

The same facts dispose of the Postal Service's assertion that its ability to raise the price of First-Class Parcels may reflect "the growth of ecommerce" or "product differentiation" rather than market dominance. USPS Reply Comments at 8-9. E-commerce undoubtedly has increased parcel volume. The relevant issue, however, is whether, *given this growth in volume*, the USPS would earn more money *ceteris paribus* by limiting price increases on First-Class Parcel to inflation or raising the prices faster than inflation. The sizeable price increases proposed by the Postal Service constitute an admission that the latter course is likely to be more profitable. This is an admission of market dominance.

Finally, the Postal Service's attempt to distinguish between market dominance and "product differentiation" is a false dichotomy. Product differentiation and market dominance are not mutually exclusive. Product differentiation may or may not create market dominance, depending on how important consumers regard the product

differences, and whether potential competitors can duplicate them. The "key question" is "whether rival producers so constrain a defendant's power as to deprive it of monopoly power . . ." 2B PHILLIP E. AREEDA *ET AL*., ANTITRUST LAW ¶ 533e at 273-73 (4th ed. 2014). As explained above, the Postal Service's recent attempts to raise the price of First-Class Mail Parcels significantly above inflation reveal that the answer is no.

III. THE POSTAL SERVICE'S STRUCTURAL ANALYSIS CONFIRMS THE LACK OF EFFECTIVE COMPETITION FOR FIRST-CLASS MAIL PARCELS.

The Postal Service's case for exempting First-Class Mail Parcels from maximum rate regulation would fail even if the Postal Service had not admitted that it can increase its total contribution by increasing price of First-Class Mail Parcels, and indirect structural evidence of the Postal Service's competitors thus were still relevant. *Cf*. USPS Reply Comments at 6. The Postal Service's analysis of "competition" from the Priority Mail Flat-Rate Box and competition from private carriers such as FedEx and UPS is also deficient. We discuss each in turn supposed form of competition.

A. The Priority Mail Flat-Rate Box Is Not A Competitive Constraint On The Price of First-Class Parcels.

As GameFly explained in its initial comments, "competition" from the Priority Mail Flat-Rate Box cannot be regarded as effective competition for First-Class Mail Parcels. First, the Postal Service's prices for Priority Mail Flat-Rate Boxes are too high to serve as an effective constraint on the price of First-Class Mail Parcels at most weight increments. GameFly Comments at 11-14. Second, the Priority Mail Small Box cannot be considered a competitor of First-Class Mail Parcels because the Postal Service sets the prices of both products and receives the revenue from both. If the latter product were exempted

from maximum rate regulation, the Postal Service could raise the prices of both products in tandem. For this reason, both the economic literature and antitrust precedent recognize that competition between products offered by the same firm is illusory. GameFly Comments at 11-16. So does 39 U.S.C. § 3642(b)(1): the constraint required to establish effective competition under that section is the "risk of losing a significant level of business to *other* firms offering similar products." *Id*. (emphasis added).

The Postal Service disputes none of these facts. Instead, it invites the Commission to ignore them on the theory that the Commission found Priority Mail to be a "check" on Parcel Post prices, albeit a "lesser" one than competition from private carriers, when reclassifying Parcel Post as a competitive product in Docket No. MC2012-3, *Transfer of Parcel Post to the Competitive Product List* (July 20, 2012) at 10. USPS Reply Comments at 3-4. The Postal Service's reliance on Docket No. MC2012-3 is misplaced. Only three participants submitted comments on the USPS proposal in that docket, and none challenged the Postal Service's assumption that one mail product could constitute effective competition for another under Section 3642. Even so, the Commission's decision to transfer Parcel Post to the competitive product list was based "primarily" on the Commission's finding that competition from FedEx and UPS was vigorous and effective. Order No. 1411 at 10-11. To treat the Commission's offhand comment about the "competition" from Priority Mail as binding precedent in the current case would elevate to a rule of law the playground notion that "we fooled you once, so you're stuck." Needless to say, this is not the law. An agency is entitled to repudiate prior precedent when there is good reason for doing so. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-17 (2009); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1037-39 (D.C. Cir. 2012).

The Postal Service obviously knows this. It now claims that it "has never attempted to describe Priority Mail Flat Rate Boxes as being equivalent to the private sector competition required by Section 3642(b)(1)." USPS Reply Comments at 2-3. Given this concession, the Postal Service's previous claims that the Priority Mail Flat Rate Boxes constrain the price of First-Class Mail Parcels[7] need not detain the Commission further.

B. Private Parcel Carriers Such As UPS And FedEx Offer Service Do Not Provide Effective Competition For First-Class Parcels, Particularly For Retail Customers And In Rural Markets.

The Postal Service has also failed to offer credible evidence that First-Class Mail Parcels face effective competition from private carriers such as FedEx and UPS. The Postal Service's November 14 Request, while asserting that First-Class Mail Parcels was competition from private parcel carriers (Request, Attachment B at 6), offered no analysis of the prices, terms of service, and geographic availability of parcel shipping services offered by any private carrier. Moreover, the Postal Service conceded in response to an information request that the minimum prices charged by UPS and Fed Ex for their parcel services, $6.24 and $7.50, respectively, are double or triple the prices of First-Class Mail Parcels at most weight increments. USPS responses to Chairman's Information Request No. 1, Questions 3(b), 3(c). The Postal Service also acknowledged that "single-piece and bulk mailers do occupy separate markets." USPS Response to ChIR No. 1, Question 3(e)(i). The Postal Service also admitted that First-Class Mail Parcel service is used disproportionately by "small businesses and individual consumers," that private parcel carriers have a "long-established practice" of assessing "surcharges on deliveries to rural

[7] USPS Request, Attachment B at 6-7; USPS Response to Chairman's Information Request No. 1, Question 3(b).

communities," and that many residents of rural communities are "without a competitive package delivery market." Request, Attachment B at 3, 7.

The Postal Service does not (and cannot) seriously dispute these facts in its reply comments.[8] Instead, it asserts that these facts are irrelevant because (1) the Commission must treat all First-Class Mail Parcels and competing private carriage of parcels throughout the entire United States as a single aggregated market, and (2) the Postal Service's share of this aggregated parcel volume is too low to establish "monopoly power or market dominance." USPS Reply Comments at 9-15. This approach is unlawful.

Separate product markets *must* be recognized when sellers are able to price discriminate among targeted customers. AREEDA *ET AL*. ¶ 562 at 406-07; DOJ/FTC *Horizontal Merger Guidelines* § 4.1.4 (2010). "The boundaries of such" submarkets "may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Order No. 2306 at 17 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)). Market definition "focuses on what products

[8] The USPS belatedly asserts in its reply comments that it faces competition from Deliv, a startup carrier that delivers packages from shopping malls to nearby consumers. USPS Reply Comments at 10 n. 39 (citing Erika Morphy, "Meet the Uber of the Retail World," Forbes.com (July 19, 2014) (www.forbes.com/sites/erikamorphy/2014/07/19/meet-the-uber-of-the-retail-world/)). This claim is entitled to no weight. The Postal Service offers no information on the current market share of the company, the extent to which that market share would expand if the Postal Service raised its prices, and the ability and willingness to serve small business and consumer mailers and rural areas. The article cited by the Postal Service implies that the company offers only business-to-consumer service, and only from shopping centers and other corporate sites.

are *reasonably* substitutable; [and] what is reasonable must ultimately be determined by 'settled consumer preference.'" Order No. 2306 at 38 (quoting *FTC v. Whole Foods Market, Inc*., 548 F.3d 1028, 1039 (D.C. Cir. 2008) (citing *United States v. Phila. Nat'l* Bank, 374 U.S. 321, 357 (1963)). The inability of retail customers, or senders and receivers of lightweight parcels, to use the lower prices offered by private carriers to business customers, and the more attractive prices offered by private carriers for heavier parcels, thus require that competition for business and retail customers, and heavy and light parcels, be analyzed separately. Even the Postal Service has admitted this. *See* USPS Response to ChIR No. 1, Question 3(e)(i) (acknowledging that "single-piece and bulk mailers do occupy separate markets.").

Likewise, the Merger Guidelines makes clear that individual geographic areas must be analyzed as separate markets when price differences, differences in transportation costs, service availability, customer convenience and preference, and other factors limit the extent of competition across the boundaries of each area. DOJ/FTC *Horizontal Merger Guidelines* § 4.2 (2010); 2B PHILLIP E. AREEDA *ET AL*., ANTITRUST LAW ¶¶ 550-556 (4th ed. 2014). "Further, a firm's ability to price discriminate based on customer location may justify the recognition of smaller markets." AREEDA *ET AL*. ¶ 554 at 365 n. 1 (citing *Horizontal Merger Guidelines* § 4.2). The Postal Service's admission that many residents of rural communities are "without a competitive package delivery market," and private parcel carriers have a "long-established practice" of assessing "surcharges on deliveries to rural communities," is fatal to the "total-market" approach. USPS Request at 3, 7. The availability of effective competition from private parcel carriage between higher-density point pairs does not effectively constrain the price of First-Class Mail Parcels between point pairs that private carriers do not serve except at a much higher

price. Transportation between two points cannot be substituted for transportation between two other points. Moreover, parcels, unlike letters and media mail, are not subject to any statutory uniform-rate requirement. *Cf*. 39 U.S.C. § 404(c) (uniform rate requirement for certain First-Class letter mail); *id*., §3683 (uniform rate requirement for books and other Media Mail). Under these circumstances, analyzing the Postal Service's market power by treating the entire United States is a single geographic market would be arbitrary and capricious.

The Postal Service gains nothing by invoking the supposedly "plain language" of 39 U.S.C. § 3642(b)(1). USPS Reply Comments at 10-11. To note that the term "such product" is stated in the singular merely begs the question. 39 U.S.C. § 102(6) defines a "product" as "a postal service with a distinct cost *or market* characteristic for which a rate or rates are, or may reasonably be, applied." (Emphasis added.) If a grouping of mail is too varied in its cost or market characteristics to treat as entirely competitive or entirely market-dominant under Section 3642(b)(1), the proper response is not to ignore the variations in competition, but to divide the product into multiple products, at least when a non-trivial share of the total product volume differs in its market dominance. 39 U.S.C. § 3642(c), which the Postal Service neglects to mention, explicitly authorizes this disaggregated approach:

> **(c) Transfers of Subclasses and Other Subordinate Units Allowable.**—Nothing in this title shall be considered to prevent transfers under this section from being made by reason of the fact that they would involve only some (but not all) of the subclasses or other subordinate units of the class of mail or type of postal service involved (without regard to satisfaction of minimum quantity requirements standing alone).

The Commission followed precisely this approach in one of the cases that the Postal Service repeatedly cites, Docket No. MC2012-13. In that docket, the Commission, while transferring most categories of single-piece Parcel Post from the market dominant product list to the competitive product list, redefined Alaska Bypass Service as a distinct product to keep it on the market dominant list. Order No. 1411 at 1-2.

The notion that the Commission must ignore the existence of separate product and geographic markets within First-Class Mail Parcels because the Commission followed a "total-market" approach in Docket Nos. MC2010-36 and MC2011-22 (USPS Reply Comments at 10-15) is also without merit. The cases are distinguishable on their facts. In Docket No. MC2010-36, the Commission the Commission found that lightweight ground parcels to be competitive, despite the Postal Service's large share of that volume, mainly because the Postal Service's share was "due to its significantly lower prices, which [were] currently below cost." Order No. 689 at 7. Hence, the Commission reasoned, any "pricing power the Postal Service may enjoy is illusory." *Id*. at 16. In Docket No. MC2011-22, the Commission found that the 2-to-3-day air category of First-Class Mail Commercial Parcels as competitive, despite the Postal Service's large share of that volume, because undisputed evidence indicated that customers regarded consolidator ground services as be good substitutes. Order No. 710 at 4-5.

Neither of these justifications applies in the present case. The Postal Service does not contend that existing rates on First-Class Mail Parcels are noncompensatory. Likewise, as noted above, the Postal Service has not established the existence of any good substitute for First-Class Mail Parcels in product and geographic markets where the parcel delivery services offered by private carriers are unavailable or significantly more

expensive. In particular, the Postal Service has offered no evidence that shippers of lightweight parcels regard private carriage of heavy parcels as a good substitute; that small business and retail customers are able to access the rates offered by private carriers to large business shippers; or that rural customers are able to use private carriage without paying heavy surcharges.

In any event, if Docket Nos. MC2010-36 and MC2011-22 were regarded as precedent for treating a mail product as a single market, reasoned decision making would warrant a departure from that precedent. *FCC v. Fox Television*, *supra*; *Nat'l Ass'n of Home Builders v. EPA*, *supra*.[9]

Finally, the Postal Service gains nothing from its vehement denial that its reliance on competition from FedEx and UPS was an afterthought. The Postal Service insists that it described competition from private parcel carriers as "robust"—and relied "primarily" on that competition to satisfy 39 U.S.C. § 3642(b)(1)—from the outset of the case, and that GameFly's contention to the contrary "mischaracterize[s] the evidence." USPS Reply Comments at 2 & 4 (citing USPS Request at 6). The Postal Service did invoke competition from private carriage in its initial request, and GameFly so noted. GameFly Comments at 16 (citing USPS Request, Attachment B at 6). But the Postal Service also admitted that competition from private carriers had significant limitations, particularly for "small businesses and individual consumers," and that many residents of rural

[9] In Order No. 689, the Commission asserted that rural senders and receivers of lightweight parcels would also be protected by the Universal Service Obligation ("USO"). *Id*. at 18. Nothing in 39 U.S.C. § 404(c) or any other provision defining the USO, however, bars the Postal Service from charging higher markups on lighter parcels vs. heavier parcels or retail parcels vs. bulk parcels, or imposing surcharges on parcels mailed to or from rural areas.

communities are "without a competitive package delivery market." USPS Request at 3, 7. The question before the Commission under 39 U.S.C. § 3642 is not *when* the Postal Service first claimed in this docket that competition from private carriers for First-Class Mail Parcels is effective, but *whether* this competition is effective enough to prevent sustained price increases. The Postal Service has made no such showing.

IV. THE POSTAL SERVICE MUST MAINTAIN A MARKET-DOMINANT PRODUCT OF FIRST-CLASS PARCELS FOR MATTER THAT CONSTITUTES A "LETTER" UNDER THE PRIVATE EXPRESS STATUTES.

The proposed product transfer must also be denied on the independent ground that 39 U.S.C. § 3642(b)(2) bars the Commission from reclassifying as competitive any mail product that is "covered by the postal monopoly." The Postal Service cannot overcome this objection by raising the prices for First-Class Mail Parcels to six times the one-ounce First-Class Mail letter rate. Private carriage of parcels containing parcels priced below this safe harbor is still subject to the postal monopoly. *Cf*. 39 U.S.C. § 601(b)(1). GameFly Comments at 19-21.

The Postal Service does not dispute that (1) some First-Class Mail Parcels are likely to contain matter that qualifies as "letters" under 39 C.F.R. § 310.1 and does not fall within any exemption to the Private Express Statutes; (2) Section 3642(b)(2) forbids the Commission from reclassifying as competitive any product that is "covered by the postal monopoly"; (3) a product is "covered by postal monopoly" if the conveyance or transmission of the product is "reserved to the United States" under 18 U.S.C. § 1696, "subject to the same exception as set forth in the last sentence of" 39 U.S.C. § 401(e)(1)"; and (4) the latter exception in turn refers to the private carriage of mail that is "allowable by virtue of" 39 U.S.C. § 601. Instead, the Postal Service invites the Commission to

ignore the plain language of the statute on the grounds that applying the plain language "effectively renders any postal product a market-dominant product," and private carriers historically have not tried to compete with the Postal Service on price. Hence, the Postal Service argues, "a dose of pragmatism" calls for the Commission to disregard the "literal" terms of Section 3642(b)(1). USPS Reply Comments at 16-19. The rule of law requires the Commission to decline this invitation to rewrite the statute.

Although the courts avoid adopting statutory constructions with absurd results, the statutory text may not be disregarded lightly. The Constitution assigns the legislative power to Congress, and Congress alone, and legislating often entails compromises that courts and agencies must respect. *See* U.S. Const. art. I, § 1; *Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 461 (2002). The courts therefore give the absurdity principle a narrow scope; a given construction must cross a "high threshold" of unreasonableness before a court or an agency may conclude that a statute does not mean what it says. *United States v. Cook*, 594 F.3d 883, 891 (D.C. Cir. 2010). A provision thus "may seem odd" without being "absurd"; in such instances "it is up to Congress rather than the courts to fix it," even if it "may have been an unintentional drafting gap." *Exxon Mobil Corp. v. Allapattah Services, Inc*., 545 U.S. 546, 565 (2005) (internal quotation marks omitted); *see also Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C.Cir.2002) ("Because our role is not to `correct' the text so that it better serves the statute's purposes, we will not ratify an interpretation that abrogates the enacted statutory text absent an extraordinarily convincing justification." (internal quotation marks and citation omitted)). The Postal Service has not come close to overcoming this "high threshold."

First, adhering to the plain language of the statute would *not* require that all postal products be classified as market dominant. Congress has specifically defined priority mail, expedited mail, bulk parcel post, bulk international mail, and mailgrams as competitive without regard to whether some of the matter entered in this mail might be subject to the Private Express Statutes. 39 U.S.C. § 3631(a). The anti-surplusage canon of statutory interpretation entitles Section 3631(a) to be given effect. *United States v. Butler*, 297 U.S. 1, 65 (1936). Hence, the Postal Service gains nothing with its *reducto ad absurdum* about a "$5.25 Priority Mail item." USPS Reply Comments at 16-17. Moreover, a number of mail products classified as market dominant by 39 U.S.C. § 3621(a) are far less likely to contain "letters" within the meaning of the Private Express Statutes than are First-Class Mail Parcels.

Equally wide of the mark is the Postal Service's observation that private parcel carriers do not currently compete with First-Class Mail Parcels on price. This behavior is unsurprising, given the risk of criminal penalties. It is also irrelevant. If a product classified by 39 U.S.C. § 3621(a) is covered by the Private Express Statutes, Section 3642(b)(2) bars the Commission from reclassifying the product as competitive *regardless of whether private firms would try to undercut the Postal Service on price if the Private Express Statutes were repealed.* Section 3642(b)(2) does not allow the Commission to speculate about how much competition might emerge in this hypothetical scenario.[10]

[10] The omission of any statutory rule of reason from Section 3642(b)(2) is consistent with established antitrust precedent, and the overwhelming likelihood that the horizontal pricing constraints are likely to harm consumer welfare. Price-fixing agreements among competitors are *per se* unlawful regardless of their net effect. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Socony-Vacuum Oil Co*., 310 U.S. 150 (1940).

Moreover, the very fact that the Postal Service would try to circumvent Section 3642(b)(2) by raising its prices significantly is a telling admission about the Postal Service's market power. If the Postal Service actually faced effective competition for First-Class Mail Parcels, it would not be free to employ this stratagem. Likewise, if the Postal Service is correct that private carriers would not try to undercut the price of First-Class Mail Parcels even if the Private Express Statutes allowed this, then the Postal Service has just supplied another reason for denying the proposed product transfer.

Finally, the Postal Service's reliance on prior Commission decisions approving bilateral agreements with foreign postal operators and other foreign counterparties to the competitive product list is also misplaced. *Cf.* USPS Reply Comments at 18 n. 67. The cited cases all involved bilateral agreements voluntarily entered into by large and sophisticated counterparties that indisputably possessed substantial countervailing market power. These special circumstances provided reasonable assurance that the terms of the arms-length agreements were the result of effective competition for the Postal Service's international services. For the reasons previously explained by GameFly, the record in this case provides no such assurance, particularly for small businesses and consumers, mailers of lightweight parcels, and rural residents.

CONCLUSION

For the foregoing reasons, the Postal Service's product transfer request should be denied.

Respectfully submitted,

/s/

David M. Levy
Matthew D. Field
VENABLE LLP
575 Seventh Street, N.W.
Washington DC 20004
(202) 344-4732

Counsel for GameFly, Inc.

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